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Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1637

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

IRENE M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; HENRY SOLANO, in his official capacity as the Executive Director of the Colorado Department of Institutions; ROBERT BAUSERMAN; ROBBIE L. BEAN; SUSANNE D. DOSH; DENNIS FISHER; MARY KYER; PEGGY STOKSTAD; JOHN P. STONE and RICHARD F. WALKER in their official capacities as members of the Colorado Board of Social Services,

Petitioners,

vs.

DUC VAN LE, on behalf of himself and the class of persons similarly situated,

Respondents.

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

THE QUESTION PRESENTED IN THIS CASE IS NOT MOOT

Respondents suggest (Brief in Opp., p. 20) that, "This case is well on its way to being all but moot and lacking in any real case or controversy." Nothing could be further from the truth.

Colorado has adopted legislation and has submitted a waiver

request to offer HCBS to mentally ill adults. This, however, does not make the case become moot. First, the federal government may not approve the waiver request. Second, and more importantly, this legislation and waiver request were only submitted in order to comply with the judgment of the court below. Colorado still seeks the discretion to decide when and if it will offer HCBS to different target groups. Accordingly, this case is not moot and is very much a real case and controversy.

THE QUESTION PRESENTED ARISES IN EVERY CASE WHERE A PROGRAM IS TARGETED TO A SPECIFIC GROUP, AND IT IS NOT LIMITED TO THE FACTS OF THIS CASE

Respondents suggest (Brief in Opp., p. 21) that the issue in this case is "academic or episodic" and that this case is limited to its specific facts. This suggestion is without merit.

As noted in the petition, nearly every State offers HCBS to some of its citizens. In every case, the services are offered to target populations defined by illness or condition. There is no principled

way to distinguish Colorado's HCBS program from all others in the nation. If Colorado's program violates federal law, so does every other program. The opposition Brief never confronts the fact that the law governing HCBS programs expressly permits them to be limited to "individuals with a particular illness or condition". 42 U.S.C. § 1396n(c)(7)(A)(1988 & 1990 Supp.). Given this failure, it is simply disingenuous for respondents to suggest that this case is limited to its facts. The question presented is whether an HCBS program can be targeted to a specific group, and this question is presented by every other HCBS program in the country.

CONCLUSION

This case is not moot and is not limited to the specific facts of this case. For the reasons set forth above and in the petition for certiorari, the petition should be granted.

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